

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff

v.

ANTWAN FORTENBERRY,

Defendant

2:14-cr-00387-JAD-NJK

**Order Adopting Report and
Recommendation, Granting in Part
Motion to Suppress, and Overruling
Objections
[Docs. 33, 97, 99]**

Defendant Antwan Fortenberry stands accused of two firearm offenses after he advised law enforcement officers that he had a handgun in his waistband as they began to conduct an investigatory stop of him while he sat in his parked car. Fortenberry challenges his stop as a Fourth Amendment violation and moves to suppress all evidence obtained from him.¹ He also claims he was not *Mirandized*, so his statements also must be suppressed because he never waived his Fifth Amendment rights.²

After a two-day evidentiary hearing,³ Magistrate Judge Nancy Koppe found that the law enforcement officers were credible witnesses, that they had reasonable suspicion for the investigatory stop under the collective-knowledge doctrine, and that Fortenberry was not under arrest when he admitted he had the gun in his waistband.⁴ She recommends I deny the motion to suppress the evidence obtained from the stop, along with Fortenberry's statements that he had a gun in his waistband and wanted his girlfriend to pick up his car so it wouldn't get towed. But she further recommends that I grant the motion to exclude Fortenberry's other post-arrest statements because the

¹ Doc. 33.

² Doc. 33 at 8.

³ Docs 75, 98 (transcripts); 66, 94 (minutes).

⁴ Doc. 97 at 10–13.

1 government failed to show that Fortenberry waived his *Miranda* rights.⁵

2 Fortenberry objects.⁶ He argues that Sergeant Hibbits and arresting officer Bunn were not
3 credible witnesses so the magistrate judge should not have found their testimony reliable. He
4 maintains that he was not merely stopped—he was arrested—and all evidence must be suppressed
5 because the officers lacked probable cause for that arrest. At a minimum, Fortenberry argues, the
6 gun and his statement that he had a gun in his waistband must be suppressed because the statement
7 was in response to a custodial interrogation performed without a *Miranda* waiver. Finally, he argues,
8 even if the police merely stopped him, they lacked reasonable suspicion to even do that.

9 The government responds⁷ that the inconsistencies in the law-enforcement officers' testimony
10 that Fortenberry claims render them incredible are not material to the magistrate judge's findings and
11 conclusions. It further argues that those findings and conclusions are supported by the evidence and
12 the collective-knowledge doctrine. Fortenberry was merely stopped, and law enforcement had
13 reasonable suspicion of his involvement in criminal activity to conduct that stop. Once he alerted
14 officers to the concealed, obliterated-serial-number gun in his waistband, they had probable cause to
15 arrest this ex-felon, too.

16 Discussion

17 The Federal Magistrates Act⁸ “permits a district court to refer to a magistrate a motion to
18 suppress evidence and authorizes the district court to determine and decide [the] motion based on the
19 record developed before a magistrate, including the magistrate's proposed findings of fact and
20 recommendations.”⁹ When a party files specific objections to a magistrate judge's findings and
21 recommendations, the district court must conduct a de novo review of the portions of the report to
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23 ⁵ Doc. 97.

24 ⁶ Doc. 99.

25 ⁷ Doc. 101. No reply was filed.

26 ⁸ 28 U.S.C. § 636(b)(1)(B).

27 ⁹ *United States v. Raddatz*, 447 U.S. 667, 669 (1980).

1 which objections are made.¹⁰ Although the district judge can make its de novo determination
2 without a new hearing, a hearing is required before the district court can reject the magistrate judge's
3 factual findings.¹¹

4 I have considered the original briefing, the report and recommendation, Fortenberry's
5 objections, and the government's response.¹² I have read the minutes from¹³—and pored over the
6 transcripts of—Magistrate Judge Koppe's evidentiary hearing.¹⁴ In addition, because Fortenberry
7 challenges Judge Koppe's credibility determinations, I listened carefully to the portions of the audio
8 recording of that hearing that contain the contested testimony identified in Fortenberry's objections.
9 I have also examined the exhibits admitted into evidence at the hearing and reviewed the authority
10 the magistrate judge cited in her report and recommendation. Having conducted a de novo review of
11 the report and recommendation, I adopt Magistrate Judge Koppe's findings and conclusions and
12 agree with her recommendations.

13 **A. Credibility**

14 Fortenberry's argument that the magistrate judge erred in crediting the law-enforcement
15 officers' testimony is not supported by the record. The disparities between the testimony of Sergeant
16 Hibbitts, who directed Patrol Officer Bunn to conduct the investigatory stop and arrest of
17 Fortenberry, and that of Bunn himself are immaterial to the magistrate judge's factual findings.
18 Although Bunn's recall of the events of the arrest was far from perfect, patrol officers' memories are

20 ¹⁰ 28 U.S.C. § 636(b)(1)(C); LR IB 3-2(b).

21 ¹¹ *Raddatz*, 447 U.S. at 674; *United States v. Ridgway*, 300 F.3d 1153 (9th Cir. 2002); *United States*
22 *v. Thoms*, 684 F.3d 893, 903 (9th Cir. 2012) (“a district court abuses its discretion when it reverses a
23 magistrate judge's credibility determinations, made after receiving live testimony and favorable to
24 the government, without viewing key demeanor evidence” unless “the district judge finds that the
25 magistrate judge's credibility determinations had no legally sufficient evidentiary basis so that, were
they jury determinations, judgment as a matter of law would issue for the defendant.”).

26 ¹² Docs. 33, 37, 97, 99, 101.

27 ¹³ Docs. 66, 94.

28 ¹⁴ Docs. 75, 98.

1 not infallible. Nor are they expected to be—particularly nine months after a relatively unremarkable
2 arrest. After my careful review of the transcripts and audio recording, I conclude that Bunn’s lack of
3 recall was no so poor—nor was it so inconsistent with directing Sergeant Hibbitts’s testimony—that
4 it should be wholly discarded. The magistrate judge’s recommendation to deny the motion to
5 suppress the gun, Fortenberry’s announcement that he had the gun in his waistband, and his request
6 that his girlfriend be permitted to pick up his car so it would not get towed, but to grant the motion to
7 suppress his other statements strikes precisely the right balance: Bunn’s testimony about the
8 important events and details of the investigatory stop was trustworthy with one glaring exception: he
9 could not reliably establish that Fortenberry waived his *Miranda* rights. No new evidentiary hearing
10 is necessary.

11 ***B. Investigatory stop, not arrest***

12 I also agree with Magistrate Judge Koppe’s determination that Bunn conducted a permissible
13 investigatory stop of Fortenberry. Fortenberry claims that he was arrested, not merely stopped,
14 because a reasonable person in his position would not have believed he was free to leave. He
15 contends that his restriction of freedom rose to arrest proportions because his car was boxed in, two
16 uniformed officers surrounded it, and “Bunn barraged” him by asking if he had drugs, weapons or
17 knives. The record simply does not support Fortenberry’s characterization that “Bunn barraged”
18 him; he asked a single, officer-safety-related question. And Fortenberry’s remaining arguments are
19 inconsistent with Ninth Circuit investigatory-stop jurisprudence.

20 “A valid stop does not become an arrest merely because law enforcement agents momentarily
21 restrict a person’s freedom of movement.”¹⁵ This is true even when the restriction is created by
22 boxing in the person’s car,¹⁶ by officers approaching the car, or when officers ask questions designed
23 to protect their own safety. Contrary to Fortenberry’s objection, the magistrate judge properly relied
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26 ¹⁵ *United States v. Greene*, 783 F.2d 1364, 1367 (9th Cir. 1986).

27 ¹⁶ *United States v. Summers*, 268 F.3d 683, 686 (9th Cir. 2001) (holding that no investigatory stop
28 occurred when police partially blocked the suspect’s car and asked several times for identification
because suspect could still have left on foot).

1 on the Ninth Circuit panel's opinion in *United States v. Patterson*.¹⁷ The facts of *Patterson* are
2 materially similar. While defendant Oglesby sat in the driver's seat with the motor running, "two
3 agents converged on the car" and blocked it in with their own.¹⁸ "As he emerged, Oglesby
4 spontaneously told the agents that there was a gun under the front seat."¹⁹ He moved to suppress the
5 evidence taken from him, claiming the agents lacked probable cause or reasonable suspicion.²⁰ The
6 government conceded the agents lacked probable cause but argued they had "founded suspicion" for
7 an investigatory stop that "ripened into probable cause for an arrest when the gun was discovered."²¹

8 Oglesby argued that the restriction on his liberty turned the stop into an arrest that required
9 probable cause, but the Ninth Circuit disagreed. It found that blocking Oglesby's car and ordering
10 him from the car were just "reasonable precautions" during the lawful *Terry* stop:

11 we have no difficulty characterizing the agents' initial encounter with
12 Oglesby. Had he attempted to drive away after they approached him,
13 they could have pursued him. The Constitution does not require them
14 to have given him a head start. He was in the driver's seat with the
15 motor running. Blocking the car was a reasonable precaution to ensure
16 that the inquiry would not be terminated prematurely. . . . Although an
17 innocent person in Oglesby's position might reasonably have believed
18 he was not free to go, the force used was not excessive and the
19 innocent person could not reasonably have assumed he was being
20 taken into custody indefinitely. The stop was not an arrest.²²

21 That the suspected offense in *Patterson* was felony narcotics trafficking, not misdemeanor
22 aiding and abetting prostitution, does not render it inapposite. The test for whether an arrest has
23 occurred is a totality-of-the-circumstances one and it does not change merely based on the
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26 ¹⁷ *United States v. Patterson*, 648 F.2d 625 (9th Cir. 1981).

27 ¹⁸ *Patterson*, 648 F.2d at 628.

28 ¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 631.

²² *Id.* at 633–34 (internal citations omitted).

1 characterization of the suspected offense.²³ Nor is *Patterson* distinguishable because Oglesby
 2 revealed his gun without prompting, while Fortenberry declared he had a gun in his waistband after
 3 being asked if he was armed.²⁴ “Police are entitled to take steps to assure that the person stopped is
 4 not armed.” That includes asking questions “necessary to secure their own safety or the safety of the
 5 public.”²⁵

6 The testimony at the evidentiary hearing demonstrated that this investigatory stop of
 7 Fortenberry as he sat in the driver’s seat of his parked car was brief, officers did not have guns
 8 drawn,²⁶ and Fortenberry announced he had a gun concealed in his waistband after a single question
 9 by the approaching officers.²⁷ This stop was proportional to the occasion and brief in duration; it was
 10 a valid *Terry* stop, not an arrest, and not custodial. At the earliest,²⁸ the encounter ripened into an
 11 arrest with probable cause—just like in *Patterson*—when Fortenberry announced that he had a
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13 ²³ *Id.* at 632.

14 ²⁴ Doc. 98 at 153.

15 ²⁵ *New York v. Quarles*, 467 U.S. 649, 659 (1984); *United States v. Basher*, 629 F.3d 1161, 1167 (9th
 16 Cir. 2011) (relying on *Quarles*’s public-safety exception to question about the location of a gun);
 17 *United States v. Willis*, 431 F.3d 709, 712, 717 (9th Cir. 2005) (holding that suppression was not
 18 required when officer during stop asked, “Do you have anything on you I should know about?” and
 19 the defendant ultimately responded, “a gun.”). And because “[a]n officer’s subjective motivation is
 20 not relevant in analyzing whether questioning falls within the public safety exception,” *Basher*, 629
 F.3d at 1167, it makes no difference that Bunn testified that he asked Fortenberry whether he had
 guns or weapons for safety reasons *and* “as a distract tactic.” Doc. 98 at 154:6.

21 ²⁶ Doc. 98 at 155–56.

22 ²⁷ Doc. 98 at 153, 156.

23 ²⁸ The stop likely did not even ripen into an arrest when Fortenberry announced he had a concealed
 24 weapon and Bunn handcuffed him to retrieve it. As the Tenth Circuit explained in *United States v.*
Pontoo, 666 F.3d 20, 30–31 (10th Cir. 2011), “the limits of a *Terry* stop are not automatically
 25 transcended by an officer’s use of other prophylactic measures. When officer safety is a legitimate
 26 concern,” as it clearly was once Fortenberry announced he had a concealed firearm, “a *Terry* stop
 27 appropriately may involve the application of handcuffs” *See also United States v. Mattarolo*,
 209 F.3d 1153, 1158 (9th Cir. 2000) (quoting *Terry v. Ohio*, 392 U.S. 1, 24 (1968) (“*Terry* allows
 28 for a limited search of a suspect’s person in order for the officer “to determine whether the person is
 in fact carrying a weapon.”)).

1 concealed firearm.²⁹ The magistrate judge properly concluded that the evidence obtained from
2 Fortenberry's stop and arrest should not be suppressed.³⁰

3 **C. Reasonable suspicion for the stop**

4 Fortenberry also has not demonstrated that the magistrate judge erred by applying the
5 collective-knowledge doctrine to conclude that the arresting officers had reasonable suspicion to
6 conduct the investigatory stop. He argues that the reasonable-suspicion finding ignores many
7 uncontested facts including: "[t]he Secret Service had no more than a hunch that Mr. Fortenberry
8 'had a propensity for pimping,' information they shared with Hibbitts; they never confirmed those
9 suspicions by interacting with Fortenberry or the women alleged to be in his employ; Ms. Villasana
10 did not solicit prostitution until after she was dropped off at the Paris Hotel, so no crime was
11 occurring at the time of the drop off; nobody identified Fortenberry as Ms. Villasana's drop-off
12 driver; and although law enforcement followed the grey Infiniti SUV to the Gold Key Shops after it
13 dropped off Ms. Villasana, there was a break in the surveillance.³¹ But these facts do not undermine
14 the magistrate judge's reasonable-suspicion determination because Sergeant Hibbetts still had "a
15 particularized and objective basis for suspecting" Fortenberry "of criminal activity" based on "the
16 totality of the circumstances—the whole picture" without these facts.³²

17 As Sergeant Hibbetts summarized at the hearing, there were numerous articulable facts to
18 give rise to a reasonable basis to suspect Fortenberry of aiding and abetting prostitution. Ms.
19 Villasana was arrested for prostitution shortly after being dropped off at the Paris Hotel by a vehicle
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22 ²⁹ See also *United States v. Greene*, 783 F.2d 1364, 1368 (9th Cir. 1986) (quoting *United States v.*
23 *Medina-Gasca*, 739 F.2d 1451, 1453 (9th Cir. 1984), which holds, "founded suspicion to stop for
investigatory detention may ripen into probable cause to arrest through the occurrence of facts or
incidents after the stop").

24 ³⁰ Doc. 97 at 13.

25 ³¹ Doc. 99 at 23.

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27 ³² *Navarette v. California*, 134 S. Ct. 1683, 1687 (2014) (quoting *United States v. Cortez*, 449 U.S.
28 411, 417–18 (1981)); see also *United States v. Palos-Marquez*, 591 F.3d 1272, 1274–75 (9th Cir.
2010) (quoting *United States v. Berber-Tinoco*, 510 F.3d 1083, 1087 (9th Cir. 2007)).

1 of the same make, model, and color as Mr. Fortenberry's.³³ That vehicle was tailed from the Paris to
2 the Gold Key Shops where Mr. Fortenberry was later found parked in a vehicle that matched the
3 make, model, and color of the one that left the Paris Hotel.³⁴ Hibbitts further testified that law
4 enforcement had found information to corroborate that Villasana and Benjamin were prostitutes in
5 Fortenberry's employ, as Secret Service had indicated. Both women had been arrested for
6 prostitution in the months before Fortenberry's October 6, 2015, arrest in this case;³⁵ the same make,
7 model, and color vehicle that dropped Villasana off at the Paris that day was seen dropping Benjamin
8 off at the MGM before she was arrested there;³⁶ and Secret Service provided Hibbitts with
9 photographs of Fortenberry and the car.³⁷

10 Additionally, Sergeant Hibbitts testified that Fortenberry's presence in the proximity of the
11 Paris Hotel while Ms. Villasana was soliciting prostitution there contributed to his belief that
12 Fortenberry was involved in the criminal activity because, in his experience, "it is common for a
13 pimp or someone providing transportation to a prostitute to drive a short distance or to go a short
14 distance and then wait for the prostitute to finish [her] business and then return to pick [her] up . . .
15 ." ³⁸ "An officer is entitled to rely on his training and experience in drawing inferences from the facts
16 he observes," ³⁹ and reasonable suspicion "is not a matter of hard certainties, but of probabilities." ⁴⁰
17 These facts and observations gave the investigators on this case the particularized and objective basis
18 they needed to suspect that Fortenberry was aiding and abetting prostitution.

20 ³³ Doc. 98 at 114–115, 126, 129–31, 138.

21 ³⁴ Doc. 98 at 114–115, 126, 129–31, 138.

22 ³⁵ Doc. 98 at 54–55.

23 ³⁶ Doc. 98 at 55–57.

24 ³⁷ Doc. 98 at 52, 57–58.

25 ³⁸ Doc. 98 at 116.

26 ³⁹ *United States v. Mariscal*, 285 F.3d 1127, 1130 (9th Cir. 2002).

27 ⁴⁰ *Mattarolo*, 209 F.3d at 1157.

1 Based on these reasons and because I am adopting Magistrate Judge Koppe's findings,
2 conclusions, and recommendations in their entirety, Fortenberry's objections are all overruled.

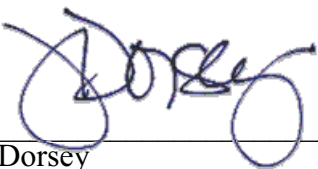
3 **Conclusion**

4 IT IS THEREFORE ORDERED that Magistrate Judge Koppe's Report and Recommendation
5 **[Doc. 97] is ADOPTED** in its entirety and defendant's objections **[Doc. 99] are OVERRULED**;

6 IT IS FURTHER ORDERED that defendant's Motion to Suppress Evidence Seized in
7 Violation of the Fourth and Fifth Amendments is **[Doc. 33] GRANTED in part and DENIED in**
8 **part:**

- 9 • Defendant's request to suppress his stop and arrest and all evidence obtained as a
10 result, including the firearm, is DENIED;
- 11 • Defendant's request to suppress his pre-arrest statement that he had a gun in his
12 waistband is DENIED;
- 13 • Defendant's request to suppress his post-arrest statement that he wanted his girlfriend
14 Villasana to pick up his vehicle is DENIED; but
- 15 • Defendant's request to suppress his post-arrest statement that he did not want to talk
16 to police, he knew nothing about the gun, and he did not drop Villasana off at the
17 Paris Hotel is GRANTED.

18 Dated this 19th day of August, 2015

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20 _____
21 Jennifer Dorsey
22 United States District Judge
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